1994

State of Utah v. Gerald Gene Blubaugh : Reply Brief

Utah Court of Appeals

Jan Graham; Utah Attorney General; Attorney for Plaintiff-Respondent.
James G. Clark; Attorney for Defendant-Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	Court of Appeals 940060-CA
vs.	:	District Court 921400519
	:	
GERALD GENE BLUBAUGH,	:	Priority No. 2
	:	
Defendant-Appellant.	:	

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM A CONVICTION OF MURDER
A FIRST DEGREE FELONY
AND A SENTENCE OF FIVE YEARS TO LIFE
IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

THE HONORABLE LYNN W. DAVIS, PRESIDING

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ARGUMENT

I

THE EVIDENCE AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THE ELEMENTS OF THE OFFENSE

The State, in its brief, argues that the evidence at trial establishes each of the elements of the offense of depraved indifference murder sufficiently to exclude reasonable doubt. The elements of depraved indifference murder under § 76-5-203(1)(c), Utah Code Annotated, 1953 as amended, are as follows: (1) that the Defendant engaged in conduct which created a graved risk of death to another and that conduct resulted in the death of another; (2) the Defendant knew that his conduct or the circumstances surrounding his conduct created a grave risk of death to another; (3) the Defendant acted under circumstances evidencing a depraved

indifference to human life. (Brief of Appellee, p.16-17) State v. Standiford, 769 P.2d 254 (Utah 1988); State v. Bolsinger, 698 P.2d 1214 (Utah 1985).

As to the first element, the evidence was insufficient as a matter of law to establish that the Defendant engaged in any conduct which created a grave risk of death to another. The evidence was clear that the child suffered a skull fracture as well as severed interspinous ligaments but that neither injury was the actual cause of death. That was the testimony of Dr. Richard Boyer at Tr. V. 3, at 1270, lines 7 through 14.

There was no evidence that this Defendant had ever engaged in any conduct which would produce a skull fracture or the back injury. The only evidence involving the child's head was a slap on top of the head which was insufficient to cause any injury. (Tr. V. 2, at 1037, 1044; V. 4, at 1414, 1416). The only evidence involving the back was the Defendant's practice of holding the infant in the fetal position in a manner which was insufficient to cause injury. Indeed, no injuries from either practice were ever reported and neither practice would be sufficient to cause injury without a great deal of additional force or trauma. (Tr. V. 3, at 1272-1273).

There was no evidence at all that any conduct engaged in by this Defendant actually created a grave risk of death. Again, the

evidence was that some additional force or different conduct would be necessary to create any risk or injury at all, certainly to create a grave risk of death. (Tr. V. 3, at 1272-1273). Neither the State nor the jury is entitled to rely on the fact of death to establish that any conduct by this Defendant created a grave risk of death. State v. Workman, 852 P.2d 981 (Utah 1993); State v. Tanner, 675 P.2d 539 (Utah 1983). The evidence must be substantial and sufficient to establish that this Defendant's conduct actually created a grave risk of death and actually caused the death of this child. The evidence in this case totally fails in that regard.

The second element requires proof that the Defendant knew that his conduct or the surrounding circumstances created a grave risk of death. In other words, even if a grave risk of death was actually created, the evidence must, in addition, establish that this Defendant knew that such a risk was created by the conduct and chose to engage in that conduct anyway.

There is no evidence of the Defendant's knowledge of the existence of a grave risk of death because there is no evidence of any conduct on his part which created the risk in the first place. The State relied heavily on the practice of the Defendant of holding the child in the fetal position in a manner which was considered improper by Rona Harding. The evidence was uncontroverted, however, that such conduct would not, in and of

itself, create a grave risk of death without additional force or without some different conduct, none of which was ever observed relative to this Defendant. Even Mrs. Harding's testimony was that she never observed this Defendant to engage in conduct which she thought was for the purpose of hurting this child. (Tr. V. 2, at 1105-1106, 1111-1112). Indeed, the nature of the argument between the Defendant and Rona Harding was that Mrs. Harding felt that there was some chance of harm to the child and the Defendant felt that his conduct posed no danger to the child at all. Mrs. Harding's testimony was that because of that difference of opinion she and the Defendant argued frequently about various medical issues. (Tr. V. 2, at 1111, lines 2-15).

The State, in its brief, falls into the same evidentiary trap as did the trial court in this case by drawing inference that the Defendant knew that a grave risk of death was created from the fact that the child, did in fact, die. That analysis is reverse in its nature in the sense that because there is a death, the conduct causing that death must have created a grave risk of death and the actor must have known as much. For the evidence to be sufficient as a matter of law that the risk was created and that the Defendant knew of the risk, there must be evidence of what that conduct was and what the circumstances were surrounding the conduct so that an inference may be justified concluding that the risk was created and

known by the Defendant. State v. Workman, 852 P.2d 981 (Utah 1993); State v. Tanner, 675 P.2d 539 (Utah 1983). There was no evidence at this trial from which the jury could reasonably conclude that this Defendant knew that his conduct created a grave risk of death.

The third element of this offense requires proof that the Defendant's conduct evidenced depraved indifference to human life. While this analysis is similar to the element of knowledge of a grave risk of death, it differs in that this element includes the actus reus or the nature and extent of the conduct. State v. Standiford, 769 P.2d 254 (Utah 1988); State v. Bolsinger, 698 P.2d 1214 (Utah 1985). Once again, the evidence at trial failed as a matter of law to establish that this Defendant's conduct fit the legal requirement of depraved indifference.

The State, in its brief at page 22, relies on the fact of death and the nature of the injuries to infer the presence of depraved indifference. In other words the State engages in an injury based analysis of depraved indifference. The element of depraved indifference, however, requires a conduct based analysis, or in other words, requires evidence of the nature and extent of the conduct, not necessarily the injuries. There was no evidence of what conduct by this Defendant could have caused this child's injuries or her death, other than mere speculation that he could

have extended his prior conduct to include much greater force or greatly increased pressure on this child without any evidence that he did so. The defense contends that such a leap crosses the boundary from justifiable inferences to rampant speculation.

The Defendant presented alternative theories, based on evidence, which were inconsistent with the guilt of the Defendant. Unless the evidence is sufficient to exclude those alternate theories and so to exclude reasonable doubt, the evidence is insufficient as a matter of law to uphold a verdict of guilty. State v. Gallegos, 851 P.2d 1185 (Utah App. 1993); State v. Worthen, 765 P.2d 839 (Utah 1988). The evidence that Christy Barney had equal access to the child, even more access to the child inasmuch as she was alone with the child for three hours after the Defendant left for work at 5:30 a.m. on the morning the child was hospitalized, and that Ms. Barney was more likely to have injured the child and caused her death, create reasonable doubt as a matter of law. Even the testimony of Ms. Barney was that if anyone hurt this child, it was her, not this Defendant. (Tr. V. 6, at 1807; Tr. V. 5, at 1647-1648; V. 5, at 1650; Tr. V. 5, at 1656-1660; V. 4, at 1497; Tr. V. 2, at 1020). This verdict is based on speculation and conjecture and is, indeed, "so inconclusive or inherently improbable that reasonable minds must have entertained

a reasonable doubt that Defendant was guilty." State v. Gallegos, 851 P.2d 1185, 1190 (Utah App. 1993).

II

THE ISSUE OF THE ADEQUACY OF THE DEPRAVED INDIFFERENCE INSTRUCTION IS PROPERLY BEFORE THIS COURT

The State argues in its brief that the Defendant waived any objection to the instruction given by the Court defining depraved indifference as an element of the offense of depraved indifference homicide. (State's brief at p. 24) The basis for this assertion is that in a written objection to the requested instruction counsel for the Defendant stated that the requested instruction was a "correct statement of the law, but the Defendant has submitted a modified requested instruction D4a which is a correct statement of the law and more accurately and adequately defines the term 'depraved indifference' according to current rulings of the Utah Supreme Court." (Tr. at 423) All of this language was in the context of a written objection to the instructions D4 and D4a requested by the State. When the trial judge presented the instruction in the form as he intended to give it in the charge to the jury, no opportunity was afforded to the Defendant to argue the objection. Defendant's trial counsel indicated that the Defendant still objected to the instruction but no opportunity was afforded to restate the objection nor to argue it.

Against this factual background, the State's argument that no objection was stated to the trial court nor preserved for appeal as to Instruction No. 4 is without merit. Indeed, a statement that a requested instruction is a "correct statement of the law" but still inadequate, inaccurate or incomplete and that the Defendant has submitted an alternate request which "more accurately and adequately" meets the legal requirements for sufficiency can hardly be said to waive any objection on the instruction. The Defendant has now, quite candidly, submitted on this appeal that neither the request by the State nor the request by the Defendant nor the instruction as given by the Court rise to the level of sufficiency in accordance with the prior rulings of the Utah Supreme Court. That assertion, however, does not imply waiver or invitation to error.

Even if this Court finds that the Defendant's statement of objection to the trial court lacks sufficiency by failing to state "distinctly the matter to which he objects and the grounds of his objection", (State v. Perdue, 813 P.2d 1201, 1203 (Utah 1991)) Instruction No. 4 as given by the trial court constitutes "plain error" and "exceptional circumstances" resulting in "manifest injustice" so to required this Court to review the matter on appeal.

Rule 103(d) of the Utah Rules of Evidence provides that this Court may take into consideration "plain error" that affects the "substantial rights" of a party even though the error was not brought to the attention of the Court. State v. Brown, No. 900148 (Utah 1992); State v. Eldredge, 773 P.2d 29 (Utah 1989). The standard in finding plain error requires that first, the error be plain, i.e. the record must indicate that it should have been obvious to the trial court that it was committing error. Second, the error must affect the substantial rights of the accused, i.e. that the error is harmful. State v. Eldredge, 773 P.2d 29, 36 (Utah 1989).

The nature of the elements of depraved indifference homicide make it clear and obvious that a clear and correct definition of the terms used in those elements is essential to a jury which is expected to understand exactly what conduct meets the definition of those elements. Instruction No. 4 completely fails in that regard as pointed out in the initial Brief of Appellant in this case. It is the trial judge's duty to properly instruct the jury and to correct errors in instructions requested by counsel before giving the charge to the jury. State v. Jones, No. 890297 (Utah 1991).

Indeed, Instruction No. 4 is much more than a general instruction to the jury as to their duty. Instruction No. 4, while it is not the actual elements instruction setting out the various

elements of the offense, it is a part and parcel of the elements instruction because it gives the definitions of terminology used in the elements instruction. Because Instruction No. 4 fails to properly or adequately define the terminology of the elements of depraved indifference homicide, this jury was left to speculate as to the meaning of those elements. In this case, the jury was left to wonder what the difference was between depraved indifference and reckless conduct. The Defense contends that it was precisely this failure in the instructions which allowed this jury to reach its verdict of guilty on the questionable evidence in this case.

The Utah Supreme Court has consistently held that it is plain error for a trial court to fail to give "an accurate instruction upon the basic elements of an offense". State v. Jones, No. 890297 (Utah 1991). Failure to do so constitutes reversible error, which error can never be harmless. id. The instruction must instruct the jury with respect to all the legal elements that it must find to convict of the crime charged. id.

The contention of the Defense is that a complete failure to properly instruct as to the definitions of the words or the phrases used in the elements instruction is tantamount to a complete failure to instruct on the elements in the first instance. That is especially true in a case such as this where the legal theory of depraved indifference is obscure even to the trained legal mind.

State v. Standiford, 769 P.2d 254, 263 (Utah 1988). The difference, if such exists, between a "substantial and unjustifiable risk" of death (manslaughter) and a "grave risk of death" (depraved murder) has been said to be not meaningful. Id. A lack of definition of these legal terms leaves the jury without necessary guidance to determine whether the facts in the case presented meet the necessary definitions or elements of the offense charged.

Finally, this is not a case where trial counsel merely remained silent on the offending instruction (State v. Medina, 738 P.2d 1021 (Utah 1987)) or where the Defendant requested the instruction of the trial Court (State v. Perdue, 813 P.2d 1201 (Utah 1991)). Defendant's trial counsel objected in writing to the requested instruction on the grounds that it failed to adequately define the elements terminology and that "Defendant has submitted a modified requested instruction D4a which is a correct statement of the law and more accurately and adequately defines the term 'depraved indifference' according to current rulings of the Utah Supreme Court." (Tr. at 423) While the objection as stated to the trial Court may have not included all of the arguments advanced on appeal, the objection and the grounds stated therefor were certainly adequate to notify the trial judge that the Defendant contended that the instruction as given was improper and that other

instructions were necessary to so instruct the jury and why. This issue is properly before this Court on appeal.

III

THE ISSUE OF UNCONSTITUTIONALITY OF THE UTAH DEPRAVED MURDER STATUTE IS PROPERLY BEFORE THE COURT

The State argues that the Defendant's constitutionality argument pertaining to Section 76-5-203, Utah Code Annotated, 1953 as amended is improper on appeal inasmuch as it was not raised below. The Defense, however, contends that the statute is unconstitutional on its face and that its application to this Defendant was plain error and that special circumstances are present which mandate consideration of this issue on appeal to prevent manifest injustice.

The plain error exception is governed by State v. Eldredge, supra. The analysis which pertains to finding plain error is discussed fully in Point II above and the same analysis applies in the case of the constitutional issue. The Defendant contends that plain error exists because the statute is unconstitutional on its face and as applied to this Defendant and the Court of Appeals should so find.

"Exceptional circumstances" is a term which "is broad and remains somewhat undefined". State v. Archambeau, 820 P.2d 920 (Utah 1991). One factor to be considered in determining whether exceptional circumstances exist is whether the Defendant's liberty

is at stake. State v. Archambeau, supra.; State v. Breckenridge, 688 P.2d 440 (Utah 1983); State v. Jameson, 800 P.2d 798 (Utah 1990). In this case, it certainly is. Other factors have not been clearly defined for exceptional circumstances. The Defendant contends that exceptional circumstances exist in this case in that the statute in question is unconstitutional on its face and as applied. The Utah Supreme Court has recognized the difficulty in delineating how the elements of depraved murder differ from manslaughter. The time has come to declare the legal fiction of depraved indifference unconstitutional and this case presents the best example why that is the correct result.

CONCLUSION

In conclusion, the Defendant-Appellant submits that this Court should find that the evidence below was insufficient to support the verdict of guilty and this case should be remanded with instructions to enter a dismissal. In the alternative, this Court should find that the Utah Depraved Murder statute is unconstitutional and reverse this judgment. In the alternative, this Court should find that the Defendant was deprived of a fair

trial on the remaining grounds on appeal and should remand for a new trial.

Submitted this 27th day of February, 1995.

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Defendant-Appellant, postage prepaid, this 27th day of February, 1995, to the following:

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